U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: July 2, 2001

In the Matters of:

MARTIN KAPLAN,
Employer,

on behalf of

ZOILA PALACIOS-VIVAR,
Alien

BALCA Case No. 2000-INA-23
[ETA No. P1998-NY-02365204]

and

GLENDA ABLACK,
Employer,

on behalf of

TERESA BOSSY,
Alien

BALCA Case No. 2000-INA-117
[ETA No. P1997-NY-02109514]

and

ADAM BAK,
Employer,

on behalf of

ELZBIETA JAGIELSKA,
Alien

BALCA Case No. 2000-INA-178
[ETA No. P1999-NY-02408806]

Appearances: For Employer Glenda Ablack:
Tadeusz Kucharski
New York, NY

For Employer Adam Bak:
Andrew J. Olshevski, Esquire
Brooklyn, NY

For Employer Martin Kaplan:
Geoffrey Stewart, Esquire
Mision Hispana, New York, NY

For the Certifying Officer, Dolores Dehaan, New York, NY:
Stephen R. Jones, Esquire
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC

For *Amicus Curiae*, American Immigration Law Foundation
and American Immigration Lawyers Association:
Kenneth H. Stern, Esquire
Stephanie Goldsborough, Esquire
Stern and Elkind, LLP, Denver, Colorado

Before: Burke, Chapman, Holmes, Huddleston, Jarvis, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

These matters arise from Employers' request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] The Board has considered these matters *en banc* to consider the method for review of applications involving domestic cooks with job requirements for experience in specific styles or types

[1] Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files ("Kaplan AF"; "Ablack AF"; and "Bak AF"), and any written arguments. 20 C.F.R. 656.27(c).

of cuisine. We hold that cooking specialization requirements for domestic cooks are unduly restrictive within the meaning of the regulation at section 656.21(b)(2), and therefore must be justified by business necessity. Moreover, we hold that cooking specialization requirements for domestic cooks normally should be analyzed under the business necessity standard of section 656.21(b)(2) prior to their consideration as a factor under the *bona fide* job opportunity analysis of section 656.20(c)(8).

STATEMENT OF THE CASES

Martin Kaplan, 2000-INA-23

On February 20, 1997, Employer, Martin Kaplan ("Kaplan"), filed an Application for Alien Employment Certification seeking to fill the position of "Cook-Kosher." (Kaplan AF 4-7). The duties were listed as follows:

> Plans, prepares and cook [sic] meals, according to the principles of Kosher cuisines and recipes, such as: Kosher meats, kreplach, stuffed cabbage, matzo balls. Decorates dishes according to nature of celebration. Purchase foodstuff. Cleans kitchen and cooking utensils. Serves Meals.

(Kaplan AF 7). Kaplan required 2 years of experience in the job offered. *Id.*

The CO issued a Notice of Findings ("NOF") on June 25, 1999, in which she stated her intent to deny the application. (Kaplan AF 23-27). The CO first noted that it was unclear whether there was a *bona fide* job opportunity. In this regard, the CO required Kaplan to answer several questions, and to supply documentation supporting those answers. (Kaplan AF 24-26). The CO next found that Employer's requirement of two years of experience performing Kosher style cooking was unduly restrictive. The CO stated that "[t]he requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement." (Kaplan AF 24). The CO noted that the Dictionary of Occupational Titles ("DOT") does not include particularized experience in the preparing of ethnic/religious foods, and thus found that Kaplan's requirement was unduly restrictive. Kaplan was informed that he could rebut the finding by demonstrating a business necessity for the requirement. Kaplan was also specifically requested to provide "[e]vidence to support that an applicant with 2 years of cooking experience could not readily adapt to a Kosher style of cooking" and "[e]vidence to show that an applicant with no prior experience in Kosher cooking is incapable of preparing Kosher food." (Kaplan AF 23-24).

Kaplan filed his rebuttal to the NOF on July 16, 1999. (Kaplan AF 28-65). Employer first addressed a number of the CO's concerns as to whether there was a *bona fide* job. As to the restrictive requirement, Kaplan stated that his family has traditionally eaten Kosher food, and that his household and religion require such cooking. Further, Kaplan stated that because of his busy schedule, he could not train someone to cook in a Kosher manner. (Kaplan AF 11).

The CO issued her Final Determination denying the application on August 25, 1999. (Kaplan

AF 66-68). The CO found first that Kaplan had failed to document sufficiently that a *bona fide* position existed. (Kaplan AF 67). The CO further found that Kaplan had not documented business necessity for the restrictive requirement. Specifically, the CO found that Kaplan had not documented that someone with two years of experience in domestic cooking could not cook Kosher style foods without specialized experience. (Kaplan AF 66-67). Thereafter, Kaplan requested review before the Board. (Kaplan AF 69-73).

Glenda Ablack. 2000-INA-117

On November 6, 1996, Employer, Glenda Ablack ("Ablack"), filed an Application for Alien Employment Certification for the position of "Cook/household/live-out." (Ablack AF 67). The duties were described as follows:

> Prepare and cook natural food dishes such as Tofu Vegetable Rolls, Baked Falafel, Black Bean Turnover. Mix & cook ingredients for products that are wheat-free, dairy/oil/sugar free, vegetarian. Cook products such as pumpkin filling, sweet potato filling from scratch for use in desserts.

(Ablack AF 7). Ablack required two years of experience in the job offered. *Id.*

The CO issued a NOF on June 10, 1999. (Ablack AF 29-34). The CO first noted that it was unclear whether there was a *bona fide* job opportunity. In this regard, the CO required Ablack to answer several questions, and to supply documentation supporting those answers. (Ablack AF 30-32). The CO also found that the Employer's requirement of two years of experience performing Vegetarian style cooking was unduly restrictive. The CO stated that "[t]he requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement." (Ablack AF 30). The CO noted that the DOT does not include particularized experience in the preparing of ethnic/religious foods, and thus found that Ablack's requirement was unduly restrictive. Ablack was informed that she could rebut the finding by demonstrating a business necessity for the requirement. Ablack was also specifically requested to provide "[e]vidence to support that an applicant with 2 years of cooking experience could not readily adapt to a Vegetarian style of cooking" and "[e]vidence to show that an applicant with no prior experience in Vegetarian cooking is incapable of preparing Vegetarian food." (Ablack AF 23-24).

Ablack filed her rebuttal on July 8, 1999. (Ablack AF 35-60). Ablack first addressed the issue of whether a *bona fide* position existed, including detailed records of business entertaining at home, and evidence of a sufficient household income to pay for the cook. As for the restrictive requirement, Ablack argued that it was necessary based on her past experiences. Specifically, she argued that "business guests" had complained about restaurant food and had even become sick. She alleges that "when such problem [sic] occurred meat or fish was the problem." She thus argued that her household needed someone to cook vegetarian style dishes, and that no one in her home could train them. (Ablack AF 57).

The CO issued her Final Determination denying the application on August 19, 1999. (Ablack AF 61-62). The CO found that Employer had successfully rebutted the section 656.20(c)(8) citation. The CO, however, found that Employer had failed to rebut the finding that two years of experience in vegetarian cooking was a restrictive requirement or to prove that the requirement was a business necessity. Specifically, the CO noted that Ablack had "failed to submit any conclusive evidence that proves an experienced cook, without 2 years of specialized experience in preparing Vegetarian foods, could not perform this job." (Ablack AF 61). Thereafter, Ablack filed a request for review before the Board. (Ablack AF 63-81).

Adam Bak, 2000-INA-178

On July 28, 1997, Adam Bak ("Bak"), filed an Application for Alien Employment Certification for the position of "Cook, Polish Style, Household (live-out)." (Bak AF 1-5). The duties were described as follows:

> Prepare & cook family-style, Polish cuisine foods & meals. Serve meals. Assist the owner of the residence in menu preparation & purchasing foodstuffs. Check foodstuffs for quality & quantity. Cook foodstuffs in quantities according to the number of guests & as suitable for occasion. Plan & follow sequence & time of cooking operations with meal serving hours & daily menu. Prepare galantines, pates, preserves. Bake cakes & pastry. Set & decorate table. Wash kitchen utensils & dishes.

(Bak AF 5). Employer required two years of experience in the job offered. *Id.*

The CO issued a NOF on June 28, 1999, in which she stated her intent to deny the application. (Bak AF 15-20). The CO first found that the CO's requirement of two years of experience performing Polish style cooking was unduly restrictive. The CO stated that "[t]he requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement." (Bak AF 19). The CO noted that the DOT does not include particularized experience in the preparing of ethnic/religious foods, and thus found that Bak's requirement was unduly restrictive. Bak was informed that he could rebut the finding by demonstrating a business necessity for the requirement. Bak was also specifically requested to provide "[e]vidence to support that an applicant with 2 years of cooking experience could not readily adapt to a Polish style of cooking" and "[e]vidence to show that an applicant with no prior experience in Polish cooking is incapable of preparing Polish food." (Bak AF 18-19). The CO next noted that it was unclear whether there was a *bona fide* job opportunity. The CO then required Bak to answer several questions, and to supply documentation supporting those answers. (Bak AF 15-17).

Bak filed his rebuttal to the NOF on August 1, 1999. (Bak AF 21-36). Bak first responded to the issue of whether a *bona fide* opportunity exists, mostly by undocumented assertions, but including evidence of a substantial household income. (Bak AF 31-35). As to the restrictive requirement, Bak first noted that the definition of domestic cook in the DOT includes the phrase "according to recipes or tastes of employer." DOT 305.281-010. Bak argues that it is his

"unquestionable right to enjoy the foods and meals of his liking[.]" (Bak AF 31). He alleges that the difference between domestic cook and Polish domestic cook is like that of any other profession, such as different types of engineers. Finally, Employer stated:

> Polish cuisine is - like any other national or religion-based cuisine - very specific in recipes and ingredients. It relies on very detailed knowledge of ingredients and traditional recipes and therefore, it would be highly unreasonable to assume that there are any employers who would be willing, ready and fully qualified to provide an applicant with on-the-job training and instruction[.]

(Bak AF 29-30).

The CO issued her Final Determination denying the application on September 28, 1999. (Bak AF 37-38). The CO first found that Bak had failed to adequately document that there was a *bona fide* position. The CO also found that Bak had "failed to submit any conclusive evidence in his rebuttal that proves an experienced cook, without the 2 years specialized experience in preparing Polish foods could not perform this job." (Bak AF 37). Thereafter, Bak requested review before the Board. (Bak AF 46-53).

Procedural History

On November 8, 2000, the Board issued an order detailing its intention to review the above matters, and address the common issues in these cases, *en banc*.[2] The parties were afforded an opportunity to submit briefs, and the Board invited the American Immigration Law Association ("AILA") and the American Immigration Law Foundation ("AILF") to submit an *amicus curiae* brief. The CO and AILA/AILF chose to submit *en banc* briefs; the attorneys for the employers and aliens did not.

On January 30, 2001, the CO filed a motion to strike portions of *Amicus'* brief in regard to attached articles regarding Kosher cooking. The CO argues that this is additional evidence, and, as it was not filed with the CO on rebuttal, is outside the record that may be reviewed by the Board. Indeed, the Board's scope of review is limited to evidence developed before the CO. *See University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); §§ 656.26(b)(4), 656.27(c). Accordingly, this evidence will be stricken from the record. We have not stricken portions of *Amicus'* brief that discuss Kosher cooking; however, *Amicus'* argument in regard to the complexity of Kosher cooking is taken in the context that the documents supporting the argument were not in the record before the CO, and are not part of the record for review by this Board.

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[2] A fourth case, *Jan Lorenz*, 2000-INA-144, was also included in the notice; however, Employer and Alien through counsel requested that the appeal be withdrawn, and the Board dismissed the appeal on March 2, 2001.

DISCUSSION

The cases before the Board involve two issues: (1) how to treat an employer's requirement that an applicant for a domestic cooking position specialize in a particular style or type of cooking under the unduly restrictive job requirement/business necessity analysis found in § 656.21(b)(2); and, (2) how an employer's proffer of a household domestic cook position that includes a specialization requirement is treated under the *bona fide* offer of employment analysis under § 656.20(c)(8).

Unduly Restrictive Job Requirements/Business Necessity

The regulations and the case law

The analysis of whether a job requirement is unduly restrictive is well-trodden ground. According to the regulations:

> (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
>
> (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
>
> (A) Shall be those normally required for the job in the United States;
>
> (B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D. O. T)* including those for subclasses of jobs;
>
> (C) Shall not include requirements for a language other than English.

§ 656.21(b)(2)(i). The three elements for determining whether a job requirement is unduly restrictive are to be read conjunctively. *Information Industries,* 1988-INA-82 (Feb. 9, 1989) (*en banc*). Accordingly, "job requirements which do not comply with all three subsections A, B and C, are unduly restrictive unless adequately documented as arising from business necessity." *Lucky Horse Fashion, Inc.,* 1998-INA-182 (Aug. 22, 2000) (*en banc*). Where the DOT supports the job requirement, it is presumptively easier for an employer to establish the other two subsections of section 656.21(b)(2)(i); but a listing of a job requirement in the applicable DOT definition is not necessarily determinative. *See, id.* (even if DOT supports foreign language requirement, an employer must still establish business necessity under subsection 656.21(b)(2)(i)(C)). Obviously, most cases involving domestic cook specializations will focus on the DOT and whether a requirement is normally required for the job in the United States, as the third requirement that the job shall not include requirements for a language other than English will only be present when the employer is requiring fluency or familiarity with a foreign language.

The DOT definition for domestic cooks is

305.281-010 COOK (domestic ser.)

Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired, or other persons and be designated Family-Dinner Service Specialist (domestic ser.).
GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81

Thus, according to the DOT definition, the duties of a domestic cook include cooking of "meals, in [a] private home, *according to recipes or tastes of employer."* DOT 305.281-010 (emphasis added). In addition, the duties may including preparing "food for *special diets.* May work closely with persons performing household or *nursing* duties." *Id.* (emphasis added).

We find that the DOT definition of domestic cook supports the notion that cooking specializations are sometimes part of the job, but we also find that the DOT does not necessarily authorize any particular specialization as a job requirement.[3] The definition is far too generalized to provide blanket authorization for individual cooking specialization requirements for domestic cooks. The DOT is merely a guideline and should be considered in context rather than simply applied mechanically. *Promex Corporation*, 1989-INA-331 (Sept. 12, 1990); *Mr. & Mrs. Mohammad Rezk*, 1989-INA-333 (Sept. 12, 1990). A job duty of cooking to the tastes or recipes of an employer, in context, is hardly an endorsement for chef specialities. The DOT's references to cooking to recipes/tastes/special diets, may or may not involve major or minor job duties in particular cases. These references are not enough to energize these duties with the inherent force of full job requirements.

Recognition that specializations may be part of the job of a domestic cook does not end the analysis because the DOT does not establish whether this particular job requirement is a duty that a cook with two years of experience should be capable of picking up and adjusting to within a reasonable period of on the job functioning (*e.g.*, by consulting cooking reference books), or a major element of the job that itself requires two years of experience (*i.e.*, a type of cooking that requires

[3] In her brief, the CO states that the DOT could be read as describing a worker, who with one to two years of experience, would be "fully qualified to serve as a domestic cook who can provide meals that meet the 'tastes of employer.'" CO Brief at 27 n.8. In other words, the CO would characterize the DOT definition as describing a domestic cook's skill level. We find that this is not a valid interpretation of the DOT definition, which clearly speaks to cooking to recipes or tastes as a job duty rather than merely a description of a worker's expected level of competency.

extensive training and experience).

In addition, we observe that when a DOT definition contains job duties described in broad and subjective terms that can then be narrowly defined by an employer in an application -- as in cooking according to the recipes or tastes of the employer -- it is all too easy for an employer to impose insubstantial or outright fraudulent specialization requirements that are tailored to the alien's qualifications with the intent of artificially decreasing the pool of qualified U.S. applicants. *See generally Cable Car Photo and Electronics,* 1990-INA-141 (June 5, 1991); *Advanced Digital Corporation,* 1990-INA-137 (May 21, 1991) (applying strict scrutiny where a great potential for fraud exists). A CO may properly conclude that a person with two years of cooking experience might be able adapt to many cooking specialties with only a minimal amount of training. *Cf. Morrison Express Corp.*, 1991-INA-77 (Apr. 30, 1992) (no evidence that job so complex that a competent accountant could not be taught the nuances with a minimal amount of orientation training).

Thus, given the weak support the DOT provides for any specific cooking specialization, the distinct possibility that many cooking specialization duties would not require two years of experience in-and-of-themselves for an otherwise qualified and experienced domestic cook to be able to perform within a reasonable period of acquiring the job, and the great potential for fraudulent or exaggerated statement of cooking specializations to tailor the job to the alien's qualifications, we hold that all cooking specializations for domestic cooks are unduly restrictive job requirements within the meaning of the regulations, and must be justified by business necessity.[4] By this holding, we do not mean to suggest that cooking specializations for domestic cooks are somehow improper or even unusual. Rather, we are only holding that a requirement of two years of experience in the specialization is unduly restrictive unless justified by business necessity.

The business necessity test is stated in *Information Industries,* 1988-INA-82 (Feb. 9, 1989) (*en banc*). The test requires that the employer show: (1) that the job requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

An application for a Kosher Cook requires a preliminary analysis before applying the

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[4] Even assuming that the DOT definition supports cooking specializations as distinct job requirements for a domestic cook, that definition does not, standing alone, provide sufficient evidence that a specialization in any particular cuisine by a domestic cook is normal for the occupation in the United States -- the second element to consider in determining whether a job requirement is unduly restrictive within the meaning of the regulations. *See Lucky Horse, supra.* Thus, even if the DOT definition supported cooking specializations as a distinct job requirement for a domestic cook, an employer must provide additional documentation of why two years of experience in the specialization - ***as opposed to cooking generally*** - *is* normal for the occupation in the United States to avoid a finding that the requirement is unduly restrictive. However, given our holding that all such specializations fail to be supported by the DOT and are therefore unduly restrictive within the meaning of the regulations, it is not necessary to address the customary for the occupation issue.

Information Industries test. We take official notice[5] that Kosher is a "Hebrew term meaning 'fit,' 'in proper condition,' as a designation for ritually pure things, especially food permitted to be used in accordance with the [Jewish] dietary laws." (The New Jewish Encyclopedia, p.275; Webster's II New Riverside University Dictionary, P. 669.) "There is no such thing as 'kosher-style' food. Kosher is not a style of cooking. Chinese food can be kosher if it is prepared in accordance with Jewish law, and there are many fine kosher Chinese restaurants in Philadelphia and New York. Traditional Ashkenazic Jewish foods like knishes, bagels, blintzes, and matzah ball soup can all be non-kosher if not prepared in accordance with Jewish law. [Kashrut]" (Judiaism 101: Kashrut: Jewish Dietary Laws, p.1.) If the application is for a person to cook the traditional Ashkenazic Jewish foods and the employer does not follow the laws of Kashrut, the application is no different from one for any other kind of specific cooking specialization and should be treated accordingly. If the application is for a person to cook following the laws of Kashrut it is relevant for the CO to inquire about the way in which the employer practices Kashrut[6] to establish the reasonable relationship to the occupation in the context of the employer's business [household]. If the application is for a person to cook traditional Jewish foods following the laws of Kashrut both components must be established.

The second prong of *Information Industries* may often focus on whether two years of experience in the specialization for otherwise experienced cooks is required to be able to cook the specialized cuisine. Thus, for example, it is not enough for an employer to establish that there are laws of Kashrut applicable to Kosher cooking - rather, the employer must also establish that it takes two years to learn to cook under the laws of Kashrut.[7] Similarly, it is not enough for an employer to establish that the family prefers a particular cuisine - rather, the employer must also establish that it takes two years to learn to cook that cuisine. In this respect, it must be remembered that an employer may not reject applicants because the alien is more qualified. *K Super KQ 1540-A.M.*, 1988-INA-397 (Apr. 3, 1989) (*en banc*); *Papalera del Plata*, 1990-INA-53 (Dec. 20, 1990), *aff'd* (Jan. 31, 1992) (*en banc*) (*per curiam*). Thus, an employer seeking to take advantage of alien labor certification when employing a domestic cook cannot demand the best cook - but only a cook who can do the job.

Application of the law to the facts of the cases

In all three cases the CO required Employers to establish business necessity under section 656.21(b)(2) for the cooking specializations.

In *Kaplan*, the NOF identified three specific points Employer had to address. These can be

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[5] *Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560, 563 (5th Cir. 1989).

[6] *E.g.*, Sets of dishes and utensils, where Kosher foods and products are purchased, etc.

[7] The CO may also inquire as to where the alien learned the laws of Kashrut and whether the alien's prior experience was in kosher cooking or cooking traditional Jewish foods.

summarized as a necessity to show that a cook without prior Kosher cooking experience is not capable of preparing Kosher foods; why Employer or a family member could not provide training; and whether the job, as described, existed before the Alien was hired, *i.e.*, whether prior cooks had two years of Kosher cooking experience. Employer, in rebuttal, submitted a statement regarding his Jewish heritage and the religious necessity of keeping Kosher. He additionally stated that due to career demands, neither he nor his wife could train someone. Finally, a letter from a previous cook, who worked for Employer as an independent contractor, was submitted to show that the same job existed previously.

The CO found that the rebuttal did not demonstrate that Kosher cooking experience was necessary. We agree. It may well be true that neither Employer nor his wife can take the time to train a cook according to the laws of Kashrut, but the NOF also required that Employer show that such training was necessary. Employer did not do so. Additionally, the letter from a past cook indicates that she cooked for Employer for a period of three years, but contains no indication at all of her experience prior to her hire by Employer. Employer has failed to show that the prior holder of the position also had to meet the restrictive requirement noted on the certification application. Thus, we find that the CO properly denied certification under section 656.21(b)(2) in *Kaplan*.[8]

In *Bak*, Employer's rebuttal consisted of the assertion that he and his wife are of Polish descent and maintain the right to enjoy Polish style cuisine. He also contended such a requirement is within the DOT definition, and accordingly is not restrictive. Finally, Employer stated that Polish cuisine requires detailed knowledge of ingredients and traditional recipes, and it would be unreasonable to assume that employers would be willing to provide on-the-job training and instruction. In *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); the Board held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) and *Chams, Inc., d/b/a Dunkin' Donuts*, 1997-INA-40, 232 and 541 (Feb. 15, 2000)(*en banc*), the Board emphasized that an employer's bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Bak's rebuttal that Polish cuisine requires detailed knowledge implies, but does not prove, that an otherwise experienced domestic cook could not adapt to cook that type of cuisine within a reasonable period of taking the job. Without supporting reasoning or evidence, Bak's rebuttal is unsubstantiated argument and not proof. Therefore, we find that the CO properly denied certification under section 656.21(b)(2) in *Bak*.

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[8] Above, we ruled that the attachments to *Amicus'* brief describing Kosher requirements was not in the record before the CO and therefore is not properly before this Board for consideration. We observe, however, that even assuming that such evidence was properly before the Board, it does not provide substantial evidence of how long it takes to gain competence to perform domestic Kosher cooking. As the CO noted in her motion to strike, much of the burden in producing Kosher cuisine is imposed on foodstuff producers, not the cook. CO Motion to strike at 2.

In *Ablack*, Employer provided very thorough documentation on the section 656.20(c)(8) issue, and in fact convinced the CO to drop this citation. Likewise, we have no hesitation in believing that Employer is seeking a domestic cook who can prepare vegan meals, and therefore the first prong of the business necessity test is established. Employer's rebuttal, however, did not attempt to establish why it would take two years to learn to cook vegetarian or vegan dishes despite being expressly asked to address this question by the CO in the NOF. Accordingly, we find that the CO properly denied labor certification under section 656.21(b)(2) in *Ablack*.

Bona Fide **Job Opportunity**

Since we have determined that none of the three employers established business necessity for the domestic cook speciality requirement presented in their applications, it is not necessary to rule on whether they had provided sufficient documentation to overcome the CO's raising of the issue of whether the domestic cook position was a *bona fide* job opportunity under section 656.20(c)(8).[9] Nonetheless, we take this opportunity to provide a clarification of the analysis of cooking specialization requirements for domestic cooks under section 656.20(c)(8), and the relationship of that analysis to section 656.21(b)(2) unduly restrictive job requirement/business necessity analysis.

The problem of whether the job opportunity for a domestic cook is a *bona fide* offer of employment under section 656.20(c)(8) was discussed by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). In *Uy*, the Board adopted a "totality of the circumstances" test for consideration of whether an application was based on a mis-characterization of the position - the problem being the appearance that employers were using the domestic cook position to have the job classified as a skilled position, and therefore avoid a long wait for a visa, when it was likely in many cases that the employer was, in reality, seeking a housekeeper who also has cooking duties. When the CO considers whether a specialization for a domestic cook is evidence relating to the *bona fides* of the classification of the job as a domestic cook versus some other domestic service position, the focus is on whether the employer is mis-characterizing the job in order to avoid long waits for a visa. In contrast, when a CO questions whether a specialization for a domestic cook is an unduly restrictive job requirement under section 656.21(b)(2), the focus is on whether the employer is seeking to tailor the job requirements to the alien's qualifications and thereby artificially reduce the pool of qualified U.S. applicants. Of course, an employer might simultaneously be attempting to both avoid the visa wait and present unduly restrictive job requirements.

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), Judge Huddleston's concurrence cited the danger of section 656.20(c)(8) analysis subsuming the rest of Part 656 where a "totality of the circumstances" test is employed to gauge the *bona fides* of an employment offer. In the three cases currently before the Board, the CO did a good job of keeping the section 656.20(c)(8) and section 656.21(b)(2) analysis separate. We wish to emphasize, however, that a cooking specialization

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[9] In the Final Determination in *Ablack*, the CO concluded that Employer's documentation was sufficient to establish the existence of a *bona fide* job opportunity. In *Bak* and *Kaplan*, however, the CO concluded in the Final Determinations that Employer's documentation was not sufficient.

requirement should be first and foremost viewed as an unduly restrictive job requirement/business necessity issue, and that a CO should normally address this issue before consideration of the *bona fides* of the employment offer issue. Not only does such a sequence honor the integrity of the regulatory scheme for analyzing job requirements under section 656.21(b), but it may also help to crystalize the section 656.20(c)(8) analysis. If an employer is able to establish that a cooking specialization for a domestic cook is justified by business necessity, that fact could become a strong factor in support of the bona fides of a domestic cooking position. If an employer is not able to establish that such a specialization is supported by business necessity, however, it may not be necessary to engage in a section 656.20(c)(8) analysis -- or -- that failure may at least tend to suggest that Employer's job offer is not *bona fide.*[10]

ORDER

The Certifying Officer's denials of labor certification in the three above captioned cases are hereby **AFFIRMED**.

For the Board:

JOHN C. HOLMES
Administrative Law Judge

[10] This order of analysis, however, is not mandatory, as in some cases it may be more efficient for the CO to consider the *bona fide* job opportunity issue first.